

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION  
No. 2000-O-06**

DATE ISSUED: May 5, 2000

ISSUED TO: Tom Irgens, President, Ray Public School District  
Board

**CITIZEN'S REQUEST FOR OPINION**

On March 24, 2000, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Dianne Brunner asking whether the Ray Public School Board violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by holding an executive session which was not authorized by law and by failing to properly follow the procedural requirements for holding an executive session.

**FACTS PRESENTED**

A few days before the March 13, 2000, regular meeting of the Ray Public School Board (Board), Dianne Brunner asked to be on the agenda of the meeting to address a concern she had with a decision of the superintendent of the District, Dennis Maasjo, to change the bus route that she drove for the District. The morning of the meeting, the members of the Board apparently received a letter from Ms. Brunner expanding on her complaints regarding Superintendent Maasjo. This letter was presented to the Board by Ms. Brunner during the March 13 meeting, resulting in the Board holding an executive session.

The executive session lasted for an hour and 20 minutes and was tape recorded in compliance with N.D.C.C. § 44-04-19.2(5). Ms. Brunner's request the next day for a copy of the recording was denied by the District under N.D.C.C. § 44-04-19.2(5). The recording has been reviewed by this office.

**ISSUES**

1. Whether the Board violated N.D.C.C. § 44-04-19.2 by failing to announce the topics to be discussed during the executive session, and the legal authority for the session.
2. Whether the executive session of the Board was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

<PAGE NAME="p.O-24">ANALYSES

Issue One:

To properly hold an executive session which is authorized by law, a governing body must follow the procedures required in N.D.C.C. § 44-04-19.2. 2000 N.D. Op. Att'y Gen. O-1 (Jan. 24 to Donna Black Cloud). These procedures include announcing the general topics to be discussed during the executive session and the legal authority for holding an executive session on those topics. Id.

In this case, it is very difficult to determine what, if any, announcement was provided during the open portion of the meeting before the Board convened in executive session. The unapproved minutes published in the local newspaper state that Ms. Brunner met with the Board "to discuss her status as a bus driver" and that a motion was passed to go into executive session, without further description of the reason or legal authority for the executive session. After the minutes were amended and approved by the Board at its next meeting, they indicated the purpose of the executive session was to "discuss student and personnel." Since the open portion of the meeting was not tape recorded, there is no way to know whether this purpose was expressed during the meeting or simply added to the minutes. In a follow-up discussion with a staff attorney in this office, the Board president and Superintendent Maasjo indicated that the approved minutes reflect the announcement that was made, and offered the additional suggestion that the meeting was closed to consider confidential student records.

The minutes are very vague on the topics discussed during the executive session, and do not describe at all the legal authority for the executive session. The District was unable to clearly identify, even after receiving an inquiry from this office, the legal authority for the executive session. A governing body is not required to cite the specific statute authorizing an executive session. However, a person attending the open portion of the meeting could not identify from the Board's announcement the legal basis for the Board's executive session. Based on the facts presented by the District regarding the announcement that was made before the March 13 executive session, it is my opinion that the announcement did not comply with N.D.C.C. § 44-04-19.2.

Issue Two:

From the recording of the executive session, it appears that some of the members of the Board believed the executive session was held to discuss Ms. Brunner's complaints as a bus driver. However, the entire executive session involved the broader conflict between Ms. Brunner <PAGE NAME="p.O-25">and Superintendent Maasjo. There is authority to hold an executive session to review the performance of a school superintendent. N.D.C.C. § 15-47-38.2. However, that

authority is limited to a formal review of the superintendent's job performance and does not apply to all discussions about a superintendent by a school board, or to consideration of complaints against a superintendent by parents or other members of the public.

The District has suggested that the executive session pertained to confidential student records. The letter sent by Ms. Brunner to the members of the Board and presented during the March 13 meeting identifies a number of students of the Ray Public School District. The Family Education Rights and Privacy Act (FERPA) provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization . . . .

20 U.S.C. § 1232g(b). See also 20 U.S.C. § 1417 (confidentiality extends to children with disabilities). The effect of this statute is to make "education records" confidential, and to authorize an executive session to discuss those records. 2000 N.D. Op. Att'y Gen. O-12 (Mar. 15 to Larry Gegelman).

Although an executive session may be held to discuss confidential "education records," the recording of the March 13 executive session of the Board does not support the District's suggestion that this authority was a proper legal basis for its executive session. The recording reveals very few references to specific students. In addition, the letter presented by Ms. Brunner was based on events she personally witnessed or facts that she had learned as a parent of students attending the school. It is my opinion that her letter is not an "education record" under FERPA, nor would it violate FERPA to allow her to discuss in an open meeting events she personally witnessed or experienced as a school employee. This office has repeatedly observed that FERPA does not apply to all discussions regarding students. See 2000 N.D. Op. Att'y Gen. at O-14; 1998 N.D. Op. Att'y Gen. O-38 (Apr. 14 to Les Jensen).

It is my opinion that none of the Board's discussion during the executive session was authorized to be closed to the public. The Board had a choice whether to address Ms. Brunner's complaints against Mr. Maasjo at the March 13 meeting, or wait until a later meeting. However, once it decided to address her concerns at the March 13 meeting, it was required under N.D.C.C. § 44-04-19 to do so in a meeting which was open to the public.

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1. The Board failed to follow the statutory requirements in N.D.C.C. § 44-04-19.2 before holding its executive session on March 13, 2000.
2. The Board violated N.D.C.C. § 44-04-19 by holding an executive session on March 13 which was not authorized by law.

#### STEPS NEEDED TO REMEDY VIOLATIONS

The Board must allow public access to the recording of its executive session on March 13, and must supplement the official minutes of the Board to reflect that discussion. The Board also must provide a copy of the recording of its executive session to Ms. Brunner as she requested.

Failure to disclose the recording as described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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cc: Dennis Maasjo, Superintendent, Ray Public School District